

ORIGINAL

FILED

August 25 2009

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 09-0322

PLAINS GRAINS LIMITED PARTNERSHIP,)
a Montana limited partnership;)
PLAINS GRAINS INC., a Montana corporation;)
ROBERT E. LASSILA and EARLYNE A.)
LASSILA; KEVIN D. LASSILA and)
STEFFANI J. LASSILA; KERRY ANN)
(LASSILA) FRASER; DARYL E. LASSILA)
and LINDA K. LASSILA; DOROTHY LASSILA;)
DAN LASSILA; NANCY LASSILA)
BIRTWISTLE; CHRISTOPHER LASSILA;)
JOSEPH W. KANTOLA and MYRNA R.)
KANTOLA; KENT HOLTZ; HOTLZ FARMS,)
INC., a Montana corporation; MEADOWLARK)
FARMS, a Montana partnership; JON C.)
KANTOROWICZ and CHARLOTTE)
KANTOROWICZ; JAMES FELDMAN and)
COURTNEY FELDMAN; DAVID P. ROEHM)
and CLAIRE M. ROEHM; DENNIS N. WARD)
and LaLONNIE WARD; JANNY KINION-MAY;)
C LAZY J RANCH; CHARLES BUMGARNER)
and KARLA BUMGARNER; CARL W.)
MEHMKE and MARTHA MEHMKE; WALTER)
MEHMKE and ROBIN MEHMKE; LOUISIANA)
LAND & LIVESTOCK, LLC., a limited liability)
corporation; GWIN FAMILY TRUST,)
U/A DATED SEPTEMBER 20, 1991;)
FORDER LAND & CATTLE CO.; WAYNE W.)
FORDER and DOROTHY FORDER;)
CONN FORDER and JEANINE FORDER;)
ROBERT E. VIHINEN and PENNIE VIHINEN;)
VIOLET VIHINEN; ROBERT E. VIHINEN,)
TRUSTEE OF ELMER VIHINEN TRUST;)
JAYBE D. FLOYD and MICHAEL E. LUCKETT,)
TRUSTEES OF THE JAYBE D. FLOYD LIVING)
TRUST; ROBERT M. COLEMAN and HELEN)
A. COLEMAN; GARY OWEN and KAY OWEN;)
RICHARD W. DOHRMAN and ADELE B.)
DOHRMAN; CHARLES CHRISTENSEN)
and YULIYA CHRISTENSEN; WALKER)
S. SMITH, JR. and TAMMIE LYNNE SMITH;)
MICHAEL E. HOY; JEROME R. THILL; and)

FILED

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

ORIGINAL

MONTANA ENVIRONMENTAL)
INFORMATION CENTER, a Montana)
nonprofit public benefit corporation,)
)
Appellants,)
)
vs.)
)
BOARD OF COUNTY COMMISSIONERS OF)
CASCADE COUNTY, the governing body of)
the County of Cascade, acting by and through)
Peggy S. Beltrone, Lance Olson and)
Joe Briggs,)
)
Appellees.)
)
and)
)
SOUTHERN MONTANA ELECTRIC)
GENERATION and TRANSMISSION)
COOPERATIVE, INC.; the ESTATE OF)
DUANE L URQUHART; MARY URQUHART;)
SCOTT URQUHART; and LINDA URQUHART,)
)
Appellees/Cross-Appellants.)

MOTION TO DISMISS APPEAL ON GROUNDS OF MOOTNESS

APPEARANCES:

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*Attorneys for Appellees/Cross-
Appellants SME/Urquharts*

MOTION AND MEMORANDUM

COME NOW Southern Montana Electric Generation and Transmission Cooperative, Inc. and the Urquharts, Appellees/Cross-Appellants herein, and move the Court to Dismiss this Appeal on grounds of mootness. Opposing counsel, Roger M. Sullivan, objects to this motion.

The Urquhart family, owners of property east of Great Falls, filed an application with the Cascade County Commissioners to rezone approximately 640 acres of ground. The Urquharts' application was granted by the Cascade County Commissioners after a lengthy hearing and the submission and consideration of volumes of documents. The rezoning application was for the purpose of the development of an electrical generation facility to be owned by Southern Montana, a member-owned Montana rural electrical

cooperative association serving over 40,000 Montana customers. The rezoning application was granted final approval March 11, 2008.

Appellants (Plains Grains, *et al.*) waited until the thirtieth day after the grant of rezoning to file an appeal challenging the rezoning of the property. The real property was sold by the Urquhart family to Southern Montana on August 25, 2008, during the pendency of Plains Grains' appeal to the district court, and the deeds were recorded August 26, 2008. (**See** Copies of Deeds, attached).¹

The district court affirmed the grant of the rezoning application on November 28, 2008. Plains Grains, *et al.*, appealed the decision of the district court affirming the action of the Cascade County Commissioners, but has not requested a stay despite the clear admonition of this Court of the availability of such procedure in its April 28, 2009 Order, remanding this matter for entry of final Judgment.

Subsequent to the purchase of the property, Southern Montana invested millions of dollars in site work, development of water sources, purchasing and securing space on the transmission network and commencing construction of certain concrete and steel foundation structures. Recently, Southern Montana has returned its air quality permit for the coal-fired plant and has submitted an application for a natural gas powered facility located on the same site which would use a great deal of the development work.

Within the last few years, the Supreme Court has rendered several decisions in zoning and subdivision cases which are consistent and controlling. These cases hold that opponents of a rezoning or subdivision application, who do not request a stay of the decision, risk having their suit dismissed when the property is sold.

¹ The deeds were filed with the district court, on August 27, 2008, in support of Appellees/Cross-Appellants' Memorandum in Support of Motion to Dismiss or in the Alternative Motion for Summary Judgment (Dist. Ct. Docket No. 24).

- ***Henesh v. Bd. of Commrs. of Gallatin County***, 2007 MT 335, 340 Mont. 239, 173 P.3d 1188 (A subdivision challenge in Gallatin County appealing the decision of the Board of Gallatin County Commissioners to the district court was held to be moot when the opponent did not ask the district court to enter a stay and the property was sold.).
- ***Povsha v. City of Billings***, 2007 MT 353, 340 Mont. 346, 174 P.3d 515 (Appeal to the Supreme Court was dismissed as moot as a result of the failure to obtain a stay and the building permit was subsequently issued and development commenced.).
- ***Mills v. Alta Vista Ranch, LLC***, 2008 MT 214, 344 Mont. 312, 187 P.3d 627 (Supreme Court again warned litigants that failure to seek a stay is fatal to a district court action seeking a writ of mandamus or judicial review when the property at issue has changed hands.).
- ***City of Whitefish v. Bd. of County Commrs. of Flathead County***, 2008 MT 436, ¶ 23, 347 Mont. 490, 199 P.3d 201 (“Notably, we chided the applicants in both *Povsha* and *Henesh* for failing to appeal the district court’s denial of the request for injunctive relief or for failing to seek a stay of proceedings until the parties could reach a resolution on the merits. We explained that we could not restore the parties to their original positions once the challenged conduct had occurred.”).

Once the property changed hands and development began, the issue of rezoning became moot because the parties cannot be returned to the status quo, as discussed by this Court in the decisions listed above. In addition, mootness is a *threshold* issue

which should be decided before review of the massive record developed below is undertaken. *In re Marriage of Gorton and Robbins*, 2008 MT 123, ¶ 16, 342 Mont. 537, 182 P.3d 746 (citing *Povsha*, *supra*).

The sale of the property, commencement of construction and significant development activity subsequent to the grant of rezoning, coupled with the failure of Plains Grains, *et al.*, to request a stay, renders the appeal moot.

RELIEF REQUESTED

Appellees/Cross-Appellants Southern Montana and the Urquharts request that the Court dismiss this appeal as moot. An Order granting the motion is enclosed. Mont.R.App.P. 16(1).

DATED this 24th day of August, 2009.

UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.

By: _____

Gary M. Zadick

Mary K. Jaraczski

#2 Railroad Square, Ste. B

P.O. Box 1746

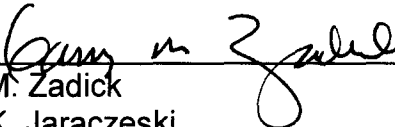
Great Falls, MT 59403

Attorneys for Appellees/Cross-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is printed with a proportionately spaced Times New Roman test typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is not more than 1250 words, excluding certificate of service and certificate of compliance.

DATED this 24th day of August, 2009.



Gary M. Zadick
Mary K. Jaraczski
Ugrin, Alexander, Zadick & Higgins, P.C.
P.O. Box 1746
Great Falls, MT 59403
Attorneys for Appellees/Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was duly served upon the respective attorneys for each of the parties entitled to service by depositing a copy in the United States mails at Great Falls, Montana, enclosed in a sealed envelope with first class postage prepaid thereon and addressed as follows:

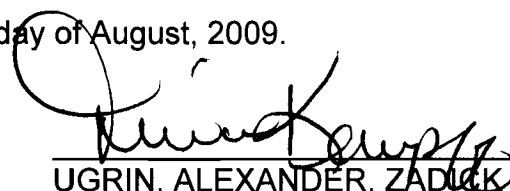
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John F. Lacey
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Kalispell, MT 59901

Elizabeth A. Best
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Great Falls, MT 59403

Alan F. McCormick
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199 West Pine
P.O. Box 7909
Missoula, MT 59807-7909

Brian Hopkins
DEPUTY CASCADE COUNTY ATTORNEY
121 4th Street North
Great Falls, MT 59401

DATED this 24 day of August, 2009.


UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.

After Recording Return To:

W. Bjarne Johnson
Church, Harris, Johnson & Williams, P.C.
P. O. Box 1645
Great Falls, MT 59403
STGF 563

WARRANTY DEED

FOR VALUE RECEIVED, Scott Urquhart and Linda Urquhart,, husband and wife, 3815 Central Avenue, Great Falls, MT 59401 ("Transferors") transfer and convey, save and except for Section 24: W½, Township 21 North, Range 5 East, M.P.M., Cascade County, Montana, contained within the property described in the legal description below, unto SME ELECTRIC GENERATION AND TRANSMISSION COOPERATIVE, INC., 3521 Gabel Road, Suite 5, Billings, MT 59102 ("Transferee"), the following premises located in Cascade County, Montana:

A tract of land in the W¼, NE¼, NW¼SE¼, and the SW¼SE¼ of Section 24, Township 21 North, Range 5 East, M.P.M., and the NW¼NE¼ and N½NW¼ of Section 25, Township 21 North, Range 5 East, M.P.M., more particularly described as follows:

Beginning at the northeast section corner of Section 24, Township 21 North, Range 5 East, M.P.M.; thence S00°51'W, 2607.08 feet to the east quarter corner of Section 24; thence S88°06'W, 1309.82 feet to the CE 1/16 corner of Section 24; thence S00°11'W, 2634.17 feet to the E 1/16 corner of section 24; thence S00°21'W, 1317.24 feet to the NE 1/16 of Section 25; thence S88°00'W, 1308.37 feet to the CN 1/16 corner of Section 25; thence S88°00'W, 2608.56 feet to the N 1/16 of Section 25; thence N00°16'E, 1319.68 feet to the northwest section corner of Section 25; thence N00°16'E, 2639.36 feet to the west quarter corner of Section 24; thence N00°16'E, 2639.35 feet to the northwest section corner of Section 24; thence N89°15'E, 2629.90 feet to the north quarter corner of Section 24; thence N87°41'E, 2620.47 feet to the northeast corner of Section 24 and Point of Beginning. According to Certificate of Survey No. S-0004500.

Deed Reference: Reel 277 Document 549, Reel 280 Document 948 and Document No. R0028030

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Cascade County, Rina Ft Moore - Clerk & Recorder



STATE OF MONTANA } ss
COUNTY OF CASCADE }

I HEREBY CERTIFY THAT THE INSTRUMENT TO WHICH THIS CERTIFICATE IS ANNEXED IS A TRUE, COMPLETE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE.

WITNESS MY HAND AND SEAL OF OFFICE

AUG 26 2008

Date
RINA FT MOORE/
Clerk and Recorder/Auditor/Recorder
By *[Signature]*
DEPUTY

TO HAVE AND TO HOLD, all the said premises and appurtenances now held or hereafter acquired by Transferors unto Transferee, and the successors and assigns of the Transferee, **FOREVER**.

Transferors will forever **WARRANT AND DEFEND** all right, title and interest in and to the premises, save and except for Section 24: W¼, Township 21 North, Range 5 East, M.P.M., Cascade County, Montana, and the quiet and peaceful possession thereof unto Transferee against all acts and deeds of Transferors and any person who may lawfully claim the premises, but only to the extent of the warranties herein granted.

EXCLUDING FROM THESE WARRANTIES title or rights to water or minerals which may be transferred by this instrument; all exceptions, restrictions, reservations, encumbrances and easements of record; visible easements; and liens for taxes and assessments for the years 2008 and following.

Dated this 27 day of August, 2008.

Scott Urquhart
SCOTT URQUHART
Linda Urquhart
LINDA URQUHART

State of Montana)
County of Cascade)

This instrument was acknowledged before me on the 22 day of August 2008, by SCOTT URQUHART and LINDA URQUHART.

(SEAL) *Cheryl Nelson*
Print Notary Name
Notary Public for the State of Montana
Residing at Great Falls, Montana
My Commission expires: 8/10, 20 12



CHERYL NELSON
NOTARY PUBLIC-MONTANA
Residing at Great Falls, Montana
My Commission Expires: August 10, 2012

After Recording Return To:

W. Bjarne Johnson
Church, Harris, Johnson & Williams, P.C.
P. O. Box 1645
Great Falls, MT 59403
STGF 5562

DEED OF CONVEYANCE

This instrument is executed the 25th day of August, 2008, by the undersigned in the capacity of the duly-appointed, qualified, and acting Personal Representative of the Estate of Duane L. Urquhart, deceased.

Proceedings for the administration of the estate are filed as Probate No. DP-08-10 in the Montana Twelfth Judicial District Court, County of Chouteau, at Fort Benton, Montana, and the undersigned, as Personal Representative, has sold to the party hereafter named the property of said estate as hereafter described, pursuant to authority as provided by law.

NOW, THEREFORE, for the purpose of completing said sale by and from said estate, the undersigned hereby sells, assigns, save and except for Section 24: NE $\frac{1}{4}$ and W $\frac{1}{2}$ SE $\frac{1}{4}$, and Section 25: N $\frac{1}{2}$ NW $\frac{1}{4}$ and NW $\frac{1}{4}$ NE $\frac{1}{4}$, Township 21 North, Range 5 East, M.P.M., Cascade County, Montana, contained within the property described in the legal description below, transfers, and conveys all of the undivided right, title, and interest of said estate unto **SME ELECTRIC GENERATION AND TRANSMISSION COOPERATIVE, INC.**, 3521 Gabel Road, Suite 5, Billings, MT 59102, in and to the real property situated in Cascade County, Montana, and particularly described as follows:

A tract of land in the W $\frac{1}{2}$, NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 24, Township 21 North, Range 5 East, M.P.M., and the NW $\frac{1}{4}$ NE $\frac{1}{4}$ and N $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 25, Township 21 North, Range 5 East, M.P.M., more particularly described as follows:

Beginning at the northeast section corner of Section 24, Township 21 North, Range 5 East, M.P.M.; thence S00°51'W, 2607.08 feet to the east quarter corner of Section 24; thence S88°06'W, 1309.82 feet to the CE 1/16 corner of Section 24; thence S00°11'W, 2634.17 feet to the E 1/16 corner of section 24; thence S00°21'W, 1317.24 feet to the NE 1/16 of Section 25; thence S88°00'W, 1308.37 feet to the CN 1/16 corner of Section 25; thence S88°00'W, 2608.56 feet to the N 1/16 of Section 25; thence N00°16'E, 1319.68 feet to the northwest section corner of Section 25; thence N00°16'E, 2639.36 feet to the west quarter corner of Section 24; thence N00°16'E,

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Cascade County, Rina Ft Moore - Clerk & Recorder



STATE OF MONTANA } SS
COUNTY OF CASCADE }

I HEREBY CERTIFY THAT THE INSTRUMENT TO WHICH THIS CERTIFICATE IS ANNEXED IS A TRUE, COMPLETE AND CORRECT COPY OF THE ORIGINAL FILED IN MY OFFICE.

WITNESS MY HAND AND SEAL OF OFFICE

AUG 26 2008

Date

RINA FT MOORE

Clerk and Recorder / Notary Public

By

DEPUTY

2639.35 feet to the northwest section corner of Section 24; thence N89°15'E,
2629.90 feet to the north quarter corner of Section 24; thence N87°41'E,
2620.47 feet to the northeast corner of Section 24 and Point of Beginning.
According to Certificate of Survey No. S-0004500.

And

Township 21 North, Range 5 East, M.P.M., Cascade County, Montana
Section 26: NE¼

Deed Reference: Reel 277 Document 549, Reel 280 Document 948 and Document No.
R0029030

Reserving, however, a non-exclusive right of access, ingress and egress on
and over said property described as, Section 26: NE¼, Township 21 North,
Range 5 East, M.P.M., Cascade County, Montana,

To have and to hold the same unto the said grantee and the successors and
assigns of the grantee forever.

IN WITNESS WHEREOF, the undersigned executes and acknowledges this
instrument as of the date above stated.

Mary E. Urquhart PR
MARY E. URQUHART, Personal Representative of
the ESTATE OF DUANE L. URQUHART, Deceased

State of Montana)
County of Cascade)

This instrument was acknowledged before me on the 25 day of August, 2008, by
MARY E. URQUHART, Personal Representative of the Estate of DUANE L. URQUHART,
Deceased



Cheryl Nelson
CHERYL NELSON
NOTARY PUBLIC-MONTANA
Residing at Great Falls, Montana
Notary Public for the State of Montana
Residing at Great Falls, Montana
My Commission expires: 8/10, 2012

W. Bjarne Johnson
Church, Harris, Johnson & Williams, P.C.
P. O. Box 1645
Great Falls, MT 59403
5T6F 5562

FOR VALUE RECEIVED, **Mary E. Urquhart**, 2044 Widow Coulee Road, Highwood, MT 59450 ("**Transferor**") transfers and conveys, save and except for Section 24: NE¼ and W¼SE¼, and Section 25: N¼NW¼ and NW¼NE¼, Township 21 North, Range 5 East, M.P.M., Cascade County, Montana, contained within the property described in the legal description below, unto **SME ELECTRIC GENERATION AND TRANSMISSION COOPERATIVE, INC.**, 3521 Gabel Road, Suite 5, Billings, MT 59102 ("**Transferee**"), all of Transferor's undivided interest in and to the following premises located in Cascade County, Montana:

Beginning at the northeast section corner of Section 24, Township 21 North, Range 5 East, M.P.M.; thence S00°51' W, 2607.08 feet to the east quarter corner of Section 24; thence S88°06'W, 1309.82 feet to the CE 1/16 corner of Section 24; thence S00°11'W, 2634.17 feet to the E 1/16 corner of section 24; thence S00°21'W, 1317.24 feet to the NE 1/16 of Section 25; thence S88°00'W, 1308.37 feet to the CN 1/16 corner of Section 25; thence S88°00'W, 2608.56 feet to the N 1/16 of Section 25; thence N00°16'E, 1319.68 feet to the northwest section corner of Section 25; thence N00°16'E, 2639.36 feet to the west quarter corner of Section 24; thence N00°16'E, 2639.35 feet to the northwest section corner of Section 24; thence N89°15'E, 2629.90 feet to the north quarter corner of Section 24; thence N87°41'E, 2620.47 feet to the northeast corner of Section 24 and Point of Beginning. According to Certificate of Survey No. S-0004500.

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Cascadia County, Rina Ft. Mosier - Clerk & Recorder

STATE OF MONTANA }
COUNTY OF CASCADE } SS
I HEREBY CERTIFY THAT THE INSTRUMENT TO WHICH THIS CERTIFICATE IS ANNEXED, IS A TRUE, COMPLETE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE.
WITNESS MY HAND AND SEAL OF OFFICE
AUG 26 2008

By [Signature] Clerk and Recorder/Auditor/Inspector
Date 11/11/03 DEPUTY

Township 21 North, Range 5 East, M.P.M., Cascade County, Montana
Section 26: NE¼

Deed Reference: Reel 277 Document 549, Reel 280 Document 948 and Document No.
R0029030

Reserving, however, a non-exclusive right of access, ingress and egress on
and over said property described as a strip of land, 40 feet in width, running
along the southern boundary of Section 26: NE¼, Township 21 North, Range
5 East, M.P.M., Cascade County, Montana,

TO HAVE AND TO HOLD, all the said premises and appurtenances now held or
hereafter acquired by Transferor unto Transferee, and the successors and assigns of the
Transferee, *FOREVER*.

Transferor will forever *WARRANT AND DEFEND* all of Transferor's undivided right,
title and interest in and to the premises, save and except for any property described as
Section 24: NE¼ and W½SE¼, and Section 25: N½NW¼ and NW¼NE¼, Township 21
North, Range 5 East, M.P.M., Cascade County, Montana, and the quiet and peaceful
possession thereof unto Transferee against all acts and deeds of Transferor and any
person who may lawfully claim the premises, but only to the extent of the warranties herein
granted.

EXCLUDING FROM THESE WARRANTIES title or rights to water or minerals which
may be transferred by this instrument; all exceptions, restrictions, reservations,
encumbrances and easements of record; visible easements; and liens for taxes and
assessments for the years 2008 and following.

Dated this 25 day of August, 2008.

Mary E. Urquhart
MARY E. URQUHART

State of Montana)
County of Cascade)

This instrument was acknowledged before me on the 25 day of August, 2008, by
MARY E. URQUHART.



CHERYL NELSON
NOTARY PUBLIC-MONTANA
Residing at Great Falls, Montana
My Commission Expires: August 8, 2012

Cheryl Nelson
Print Notary Name Cheryl Nelson
Notary Public for the State of Montana
Residing at Great Falls, Montana
My Commission expires: 8/11, 2012

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2